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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

VENTURA REALTY & INVESTMENT COMPANY, Plaintiff and Appellant, v. CITY OF SAN BUENAVENTURA et al., Defendants and Respondents; COMMUNITY MEMORIAL HEALTH SYSTEM, Real Party in Interest and Respondent.	2d Civil No. B268132 (Super. Ct. No. 56-2014-00460385-CU-WM-VTA) (Ventura County)

Respondent City of San Buenaventura (City) approved a proposal to redevelop hospital buildings and the surrounding area (the Project) in 2010. The Project includes the construction of a multistory parking structure on land that was a surface public parking lot. Originally, City had the primary responsibility for the construction, funding, and maintenance of the parking structure. However, in 2014, City shifted its responsibility for the parking structure to Community Memorial Health System (CMH), real party in interest, and City approved changes to the Project (2014 approvals).

Appellant Ventura Realty & Investment Company (Ventura Realty) is a commercial landlord and developer that wants to obtain spaces in the parking structure

for its own commercial project. It filed a petition for writ of mandate, claiming the 2014 approvals failed to comply with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) and City's charter and municipal codes.

Ventura Realty appeals the judgment denying the petition for writ of mandate. It contends City violated CEQA (1) by failing to consult with Native American tribes before the 2014 approvals, (2) by failing to require a supplemental environmental impact report, and (3) by failing to analyze the environmental impacts of a general plan amendment changing land use from residential to commercial. In addition, Ventura Realty contends City's approval of the Project violated state and local laws because (1) a parking determination was required, (2) the ground lease for the parking structure was a public works contract requiring competitive bidding, and (3) the ground lease was an economic development subsidy. We affirm.

BACKGROUND

In 2010, City approved CMH's plans to redevelop a 15-acre area for a hospital district (2010 approvals).[1] The 2010 approvals included plans to construct a parking structure that would be five stories tall, with a maximum height of 55 feet and 570 parking spaces. City planned to build, adjacent to the structure, a 3,900 square foot "retail liner" building that would contain retail businesses and conceal the parking structure. The Memorandum of Understanding (MOU) between CMH and City stated that City would have "primary responsibility" over the new parking structure. However, CMH "shall have the option to file application(s) for required approvals and permits, conduct environmental review, design, fund and construct" the parking structure. Construction for the Project began in 2011.

In 2014, CMH proposed changes to the Project. CMH exercised its option under the MOU to take responsibility for the construction, funding, and maintenance of the parking structure. CMH proposed making the structure taller and with more spaces,

[1] There were no objections to the 2010 approvals of the Project. Ventura Realty does not challenge the 2010 approvals. In any event, the time to raise objections to those approvals has now lapsed. (Pub. Resources Code, § 21167, subd. (b).)

and reducing the size of the retail liner. During the design review process, City discovered that the existing general plan designated the parking structure site residential, although the site had been a public parking lot for over 50 years. In order to make the Project consistent with the general plan, City applied for an amendment to the general plan changing the site from residential to commercial land use. City approved the general plan amendment in May 2015.

Meanwhile, Ventura Realty submitted its proposal to build a six-story building as a part of the "Wellness District," which surrounds the project area. Ventura Realty was initially in favor of the Project; however, when it discovered that CMH would be responsible for the parking spaces reserved for the Wellness District, it objected to the 2014 proposed changes to the Project.

City approved the changes to the Project. The 2014 approvals included: (1) an addendum to the 2010 environmental impact report (EIR); (2) an amended MOU, which reflected the shift of responsibilities for the parking structure from City to CMH; and (3) a ground lease for the public land on which the parking structure was to be built. The ground lease provided that City would charge CMH $10 per year in rent and specified that CMH would bear all costs for constructing and maintaining the parking structure.

Under the 2014 approvals, the parking structure would be a half-story taller with one more parking space (five and a half stories tall with 571 parking spaces). The size of the retail liner was cut more than half (reduced to 1,399 square feet). CMH was required to replace the 172 spaces in the existing surface lot, so that there would be no loss of public parking spaces. City retained the option to install parking meters on these 172 spaces and would be entitled to all revenue from the meters. In addition, CMH was required to provide a minimum of 199 parking spaces for businesses in the Wellness District. Developers wishing to use these parking spaces would need to obtain approval from City for offsite parking and then enter into subleases with CMH for predetermined amounts. The remaining 200 spaces were available for use by CMH.

In November 2014, Ventura Realty filed a petition for writ of mandate. In October 2015, the trial court denied the petition, finding no violation of CEQA or any other laws.

DISCUSSION

CEQA Challenges

Ventura Realty contends City's 2014 approvals violated CEQA in several respects. In determining whether City complied with CEQA, we review its actions for an abuse of discretion. "Such an abuse is established 'if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.' [Citations & fn. omitted.]" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426-427.) Our review of the administrative record for legal error and substantial evidence is the same as the trial court's: "The appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Id*. at p. 427.)

1) Native American Consultations

Ventura Realty claims that City committed a "per se" violation of CEQA when it deferred its consultation with Native American tribes until after the 2014 approvals. We disagree.

Senate Bill 18 (SB 18) mandates that before adoption of an amendment to a city's general plan, the city "shall conduct consultations with California Native American tribes" that are on the Native American Heritage Commission's (NAHC) contact list for the purpose of preserving or mitigating impacts to places, features, and objects located within the city's jurisdiction. (Gov. Code, § 65352.3, subd. (a)(1).)

City adopted the 2014 approvals (including an EIR addendum) before it approved an amendment to the general plan changing the parking structure site from residential to commercial land use. City deferred the approval of the amendment because it had not yet conducted the SB 18 consultation. City stated that this "process was underway, but not yet complete." City later completed its consultation and approved the amendment in May 2015.

Ventura Realty forfeited the SB 18 claim because it did not exhaust its administrative remedies. Public Resources Code section 21177 prevents a petitioner from challenging a decision on grounds that were not presented to the public agency before the close of the public hearing. (*Id*., subds. (a), (b) & (e).) The statute's purpose is to inform the agency of the contentions of the interested parties before litigation is instituted, so that it has the opportunity to address the contentions and render litigation unnecessary. (*Garrison v. Board of Directors* (1995) 36 Cal.App.4th 1670, 1676.) Generalized references to environmental concerns and mere objections to a project are insufficient. (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198.) The "'exact issue' must have been presented to the administrative agency to satisfy the exhaustion requirement. [Citation.]" (*Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1394.)

Ventura Realty did not object to City's deferral of the SB 18 consultation before the conclusion of public hearings, nor did it raise this argument in its petition. Its general objections (that the amendment had not been considered by "interested parties" and was not adopted before the 2014 approvals) were insufficient. Ventura Realty is barred from raising the claim for the first time on appeal.

Even if Ventura Realty had exhausted its administrative remedies, its contention that City's deferral of the consultation was a "per se" violation of CEQA lacks merit. The consultation requirements under SB 18 do not implicate CEQA requirements. Nothing in the text or legislative materials of SB 18 suggests that it imposes additional requirements to CEQA. (Cal. Legis. Information Website <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200320040SB18> [as of Oct. 11, 2016].) We will not interpret CEQA to impose "procedural or substantive requirements beyond those explicitly stated" by the statute or CEQA guidelines. (Pub. Resources Code, § 21083.1.)

Finally, City complied with CEQA's requirements mandating consultations with Native American tribes. (Cal. Code Regs., tit. 14, § 15064.5.) City sent a formal letter in March 2010 to NAHC, and received a response. The NAHC record search

"failed to indicate the presence of Native American cultural resources in the immediate project area." City also found that the Project would have no substantial effect regarding cultural resources, as the project area was within a "highly urbanized" portion of the city and there were "no known archaeological or paleontological resources or human remains present in the Project Area." City reevaluated environmental impacts for the 2014 approvals and concluded the Project was not located within an area identified to have sensitive Native American resources.

City did not abuse its discretion in approving the EIR addendum before conducting SB 18 consultations.

2) Supplemental Environmental Impact Report

Ventura Realty contends the 2014 approvals presented "new information," requiring a supplemental environmental impact report (SEIR) because the ground lease gave CMH discretion to regulate the use of the parking spaces and to accept or deny requests for developer parking. It claims that such discretion may lead to inadequate parking for future development. Ventura Realty also contends that City unreasonably failed to adopt a new mitigation measure requiring City's continuous monitoring of the use of the parking spaces. We reject these contentions.

CEQA does not require an EIR for every change to a project. A SEIR is required only if: (1) substantial changes are proposed in the project, requiring "major revisions" in the EIR; (2) substantial changes arise in the circumstances of the project's undertaking, requiring "major revisions" in the EIR; or (3) "new information" of substantial importance appears that was not known or available at the time the EIR was certified. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 54; Cal. Code Regs., tit. 14, § 15162.) New information includes "significant effects" not discussed in the EIR, significant effects previously examined that would be "substantially more severe" than shown in the EIR, or mitigation measures that are "considerably different" from those previously analyzed that would "substantially reduce" one or more significant effects, but the agency declined to adopt. (*Ibid*.)

We will uphold City's decision not to require a SEIR if the administrative record contains substantial evidence to support such a finding. This deferential standard reflects that an in-depth review has already occurred. (*Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal.App.4th 788, 797-798.) Ventura Realty has the burden to show there is no substantial evidence to support City's findings. (*Id*. at p. 798.)

City found no new information showing any new "significant effects," "substantially more severe" effects from those identified in the EIR, or new mitigation measures "considerably different" from those examined in the EIR that would "substantially reduce" any significant effects. (Cal. Code Regs., tit. 14, § 15162, subd. (a).) Based on these findings, City determined that no SEIR was required.

Substantial evidence supports City's findings. The 2014 ground lease reflects CMH's responsibility over the parking structure. The 2010 MOU discussed this possibility when it included an option for CMH to design, construct, and fund the parking structure. There were no objections to the MOU. There is also no evidence that the ground lease would have any new or substantially more severe effects on parking demand than those identified in the EIR. Ventura Realty points to no evidence that CMH's discretion over the spaces would result in new, or more severe, impacts for future developer parking. To the contrary, the lease specified that 172 spaces were for "unlimited public parking purposes" and 199 parking spaces *at the minimum* were for future developers. CMH lacks the power to reduce the number of developer spaces without City's consent, as the minimum number of developer spaces "may only be amended by mutual written consent" of CMH and City. There is also no evidence that Ventura Realty's suggested mitigation measure would be "considerably different" from those analyzed in the EIR or would "substantially reduce" any significant impacts. (Cal. Code Regs., tit. 14, § 15162, subd. (a)(3)(D).)

Ventura Realty also contends that a SEIR was required because the 2014 approvals included a general plan amendment. A general plan amendment is subject to CEQA. (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 388-389.) As we will discuss, the amendment did not result in substantial changes

to, or new information about, the Project. (See *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 204-206 [changes to housing element of a city's general plan did not require the preparation of an additional EIR].)

The evidence supports a finding that the 2014 approvals did not introduce new information or result in substantial changes requiring a SEIR. (Cal. Code Regs., tit. 14, § 15162.)

3) General Plan Amendment

Ventura Realty claims that the general plan amendment's redesignation of the site from residential to commercial land use would result in environmental impacts. It also claims City failed to analyze those impacts. These claims lack merit.

Ventura Realty fails to specify any environmental impact resulting from the general plan amendment. In addition, its contention focuses on the impact of the amendment, rather than the impact of the parking structure itself. City fully analyzed the environmental impacts of the parking structure in the EIR, and there were no challenges. City reevaluated the impacts of the parking structure in the EIR addendum, and it also considered the general plan amendment in its analysis. City found that the amendment would "resolve conflicts between the General Plan land use diagram" and the Project approvals, which "anticipates a parking garage and commercial uses at this location." Because the parking structure "involve[d] the same land uses" considered in the EIR (a retail liner space and parking garage), City found that the 2014 approvals would not introduce substantial changes or new information beyond those previously identified. City properly analyzed the environmental impacts of the general plan amendment when it approved the EIR addendum.

Non-CEQA Challenges

Ventura Realty claims that City's approval of the Project violated state and local laws. For an administrative action under Code of Civil Procedure section 1085, the trial court reviews an agency's action for an abuse of discretion. (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995.) On appeal, we apply the substantial

evidence test to the trial court's factual findings and review legal questions de novo. (*Id.* at pp. 995-996.)

1) Parking Determination

Ventura Realty contends the trial court erred in finding a parking determination was not required under the San Buenaventura Municipal Code section 24.512.030.[2] We disagree.

Before the Project's approval, City created "parking districts" for areas where parking availability had been an issue. The site for the parking structure had been part of "Parking District No. 3." To help regulate parking within Parking District No. 3, City adopted SBMC section 24.512.030, which requires a parking determination[3] for "any project consisting of new non-residential development or any project consisting of enlargement, expansion, or intensification of non-residential uses . . . in any instance where it is not practicable to provide offstreet parking spaces . . . directly on the subject site."

To the extent that Ventura Realty claims a parking determination was required for the 2010 approvals, that claim is now time barred.[4] (Gov. Code, § 65009, subd. (c)(1)(B).) As to the 2014 approvals, SBMC section 24.512.030 does not apply to the parking structure because it provides "offstreet parking . . . directly on the subject site." The ordinance does not apply to the retail liner because it is not a "new" development from the 2010 approvals, nor is it an "enlargement, expansion, or intensification" of nonresidential uses. The only change to the retail liner was a

[2] Subsequent references to the San Buenaventura Municipal Code shall be "SBMC."

[3] SBMC section 24.512.020 defines a parking determination as a "discretionary permit[] subject to approval by the planning commission which, when granted, authorize alternative arrangements to provide offstreet parking spaces . . . through use of parking spaces in the parking lots in Parking District No 3."

[4] We reject Ventura Realty's alternative contention that failure to conduct a parking determination was a public nuisance. The claim was not alleged in its petition.

reduction in its size. The trial court properly found that no parking determination was required for the 2014 approvals.

2) Public Works Contract

Ventura Realty claims the ground lease is a public works contract requiring competitive bidding under City's charter. We disagree.

San Buenaventura City Charter, article X, section 1006 states in relevant part: "In the construction [of] improvements and repair of all public buildings and public works, excluding maintenance, . . . when the expenditure required exceeds the sum theretofore established by ordinance, the same shall be done by contract. The contract shall be let to the lowest responsible bidder after notice . . . ."

Although City's charter does not define "public works," SBMC section 4.600.080 defines a "public works contract" as "a *contract paid for in whole or in part out of public funds* for the construction, alteration, repair, improvement, reconstruction or demolition of any public building, street, sidewalk, utility, park or open space improvement, or other public improvement." (Italics added.)[5]

The ground lease is not a public works contract because it does not require payment "for in whole or in part out of public funds." (SBMC, § 4.600.080.) The ground lease specifies that CMH has the right to use the land for "constructing, maintaining, occupying, and operating" the parking structure and the liner building at its "sole cost." This includes payment of all utilities, property taxes, permits, and insurance. Under the ground lease, CMH is allowed to recoup a portion of its costs through a precalculated rent from developers; however, City does not have to pay rent for the 172 spaces. Nor is there loss of public assets to City because all spaces from the surface lot will be replaced.

Ventura Realty contends City's lost revenue from CMH's reduced rent and rental income from the 199 developer spaces constitutes a payment of public funds. This

[5] We reject Ventura Realty's assertion that we should adopt Labor Code section 1720, subdivision (a)(1)'s definition of a "public works contract" over City's own definition.

contention lacks merit. The term "paid for in whole or part" requires actual payment. (*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1587-1589 (*McIntosh*), superseded by statute as stated in *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289.)

In *McIntosh*, the appellate court held former Labor Code section 1720, which defined "public works" as "construction . . . done under contract and paid for in whole or in part out of public funds," applied to contracts requiring actual payment of a pecuniary resource. (*McIntosh, supra,* 14 Cal.App.4th at p. 1588.) A rent reduction or a forbearance did "not fit comfortably" into that definition. (*Ibid.*) In so holding, the *McIntosh* court observed that courts will not "interfere where the Legislature has demonstrated the ability to make its intent clear and chosen not to act." (*Id.* at p. 1589.)

The definition of "public works contracts" in SBMC is identical to the one used in the statute in *McIntosh*. As in *McIntosh*, the phrase "paid for in whole or in part out of public funds" does not encompass rent reductions and potential loss of revenue. The ground lease is not a public works contract.

3) Economic Subsidy

Lastly, Ventura Realty contends the ground lease is an economic development subsidy under Government Code section 53083, subdivision (g)(1), requiring City to follow procedures and provide information to the public before the lease's approval (*Id*., subd. (a)). We disagree.

Government Code section 53083, subdivision (g)(1) defines an "economic development subsidy" as "any expenditure of public funds or loss of revenue to a local agency in the amount of [$100,000] or more, for the purpose of stimulating economic development within the jurisdiction of a local agency."

The ground lease does not constitute an "expenditure of public funds," as CMH will bear the "sole cost" of the parking structure. Nor is the ground lease a "loss of revenue" for City. The parking structure site was never a source of revenue for City because it was a *free* parking lot. City retained its right to install paid parking on the 172 spaces within the structure. City is entitled to all revenue from such paid parking. Nor

does CMH's reduced rent or City's loss of future income from developer spaces constitute a "loss of revenue." City received substantial benefits, including CMH assuming the entire cost of construction (about $15 million) and the additional cost of maintaining the structure and spaces (about $417,025 per year). As to future income from developer spaces, the rent calculation for the 199 developer spaces ($1,100 per stall per year) shows that the subleases will allow CMH to recoup only some of its building and operational costs. In light of these circumstances, there is no "loss of revenue" to City.

Furthermore, the ground lease is not a "subsidy." Government Code section 53083, subdivision (g)(1) provides examples of subsidies: "bonds, grants, loans, loan guarantees, enterprise zone or empowerment zone incentives, fee waivers, land price subsidies, matching funds, tax abatements, tax exemptions, and tax credits." The ground lease is different in nature from the statute's examples. (See *California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 189 [words are construed to embrace only things similar in nature to those enumerated by the specific words].) The legislative materials for Government Code section 53083 explains that economic subsidies, such as the ones listed in the statute, generally constitute regulations, direct spending, or tax policies. (Sen. Com. on Governance and Finance, Rep. on Assem. Bill No. 562 (2013-2014 Reg. Sess.).) The ground lease does not fit into any of these categories. The ground lease is not an economic subsidy.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

TANGEMAN, J.

We concur:

GILBERT, P. J. PERREN, J.

Glen M. Reiser, Judge

Superior Court County of Ventura

Law Offices of James B. Devine, James B. Devine; Channel Law Group, Jamie T. Hall and Julian K. Quattlebaum, for Plaintiff and Appellant.

Rutan & Tucker, M. Katherine Jenson; Gregory G. Diaz, City Attorney, and Andy H. Viets, Senior Assistant City Attorney, for Defendants and Respondents City of San Buenaventura and Mark Watkins.

Jackson Tidus and Gregory P. Regier, for Real Party in Interest and Respondent Community Memorial Health System.